

**Letter of Findings Number: 10-0524P
Negligence Penalty
For the Years 2007, 2008, 2009**

Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer was assessed negligence penalty. Taxpayer protested the penalty.

The Department sent correspondence dated September 21, 2010, offering Taxpayer the opportunity to have a hearing and/or submit additional documentation. Taxpayer did not reply to the Department's letter. Due to Taxpayer's failure to reply, this Letter of Findings is written based on the information in Taxpayer's protest file and other information available to the Department.

I. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer is in the business of renting/leasing ground storage containers. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2007, 2008, and 2009. The Department's audit found that Taxpayer had not remitted sales and use tax on certain items and therefore assessed Taxpayer additional sales and use tax. Taxpayer protests the imposition of a penalty.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer states that it is a small family business struggling to stay afloat and keep its ten employees.

Taxpayer also argues that it did not know it should collect the sales tax and none of its customers notified it of that obligation. Taxpayer, however, is presumed to know the law as a retail merchant. Also, as a retail merchant, Taxpayer collects sales tax in trust on behalf of the state. Lastly, Taxpayer had undergone a prior audit with similar issues and did not make the necessary adjustments in its accounting system. Taxpayer has not overcome its burden to show that waiver of penalty is justified.

FINDING

Taxpayer's protest is respectfully denied.

